IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 165

MAX LERNER,

Appellant,

vs.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting the New York City Transit Authority,

Appellees.

BRIEF FOR THE APPELLANT

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Opinions Below

The opinion of the Supreme Court of the State of New York (R. 17-27) is reported at 138 N.Y.S. 2d 777. The opinions of the Appellate Division of the Supreme Court of the State of New York (R. 31-49) are reported at 2 App. Div. 2d 1, 154 N.Y.S. 2d 461. The opinions of the Court of Appeals of the State of New York (R. 50-70) are reported at 2 N.Y. 2d 355.

Jurisdiction

The decree of the Court of Appeals of the State of New York was made and entered on February 28, 1957. The notice of appeal to this Court was filed on April 25, 1957 in the Supreme Court of the State of New York, Kings County. A motion of the appellees, who are sometimes referred to herein as the Transit Authority, to dismiss the appeal, was opposed by appellant. On October 14, 1957 this Court postponed further consideration of the question of jurisdiction until the hearing of the case on the merits (R. 76). The jurisdiction of this Court rests on 28 U.S.C. 1257 (2).

Questions Presented

1. Whether this Court has jurisdiction of the appeal.

2. Whether the dismissal from public employment of a subway conductor with tenure, upon the ground that he is not a good security risk, contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States, where the sole evidence thereof consists of his invocation of his constitutional privilege against self-incrimination.

3. Whether his dismissal for "activities * * * which give reasonable ground for belief that he is not a good security risk" contravenes the due process clause of the Fourteenth Amendment, because *inter alia* he was never served with charges of such activities, there was no hearing, and he has never been informed of the nature of the "activities."

4. Whether a statute which authorizes dismissal from public employment for membership without more in a "subversive organization" impairs freedom of speech, assembly and association under the Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States.

5. Whether the determination that the Transit Authority was a "security agency" and that appellant's work was "necessary to the security and defense of the nation and the state" was in violation of his right to due process under the Fourteenth Amendment when such determination was unrelated to the nature of his work and, further, was without notice to appellant and without evidence or hearing.

6. Whether appellant's privilege against self-incrimination under the Fifth Amendment to the United States

Constitution and his immunities and privileges under the Fourteenth Amendment thereto were abridged by his dismissal from public employment because he had asserted his constitutional privilege in a proceeding conducted by city authorities in pursuance of the federal government's security program.

7. Whether the state court's interpretation and application herein of the privilege against self-incrimination under the State Constitution, Article I, 6, is not so restrictive and inconsistent with that court's traditional liberal construction and application of the privilege in cases involving public officials, members of the bar and other persons as to deny appellant both due process and the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

Statutes Involved

This case involves the validity of the so-called Security Risk Law of New York, L. 1951, c. 233, as amended L. 1954, c. 105 (§§1101-1108, McKinney's Unconsolidated Laws), which is set forth in Appendix A. Other New York statutes which are involved are the New York Civil Service Law, L. 1939, c. 547 and L. 1953, c. 19 (§§12-a and 22 (2) respectively); the New York Public Authorities Law, L. 1953, c. 200 (§§1800 *et seq.*, now §§1200-1221, L. 1957, c. 914), and the New York City Charter, §§801-803 and 363. Relevant sections of these statutes likewise appear in Appendix A.

The constitutional provisions involved are the First, Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States and Article I, §6 of the Constitution of the State of New York. The pertinent portion of the provision of the State Constitution is set forth in Appendix A.

Statement

Appellant Max Lerner was a subway conductor in the transit system of New York City since November 1, 1935 (R. 6). Appellees, constituting the New York City Transit Authority, a public benefit corporation, were his last employers in such employment. (N.Y. Public Authorities Law, §1801.) Appellant's duties consisted of opening and closing subway car doors (R. 6). He had tenure under the Civil Service Law of New York State (R. 6).

As an employee with tenure, appellant could not be removed prior to the enactment in 1951 of the Security Risk Law "except for incompetency or misconduct" (Civil Service Law, §22 (2)) or for membership in an organization advocating the overthrow of the United States by unlawful means (Civil Service Law, §12-a). If discharged on the

latter ground he would have been entitled to a hearing consisting "of the taking of testimony in open court with opportunity for cross-examination." *Adler* v. *Board of Higher Education of the City of New York*, 342 U. S. 485, 493; 96 L. ed. 517, 523; 72 S. Ct. 380, 384; 25 A. L. R. 2d 1219.

On March 24, 1951 New York enacted the Security Risk Law, providing for the summary discharge as security risks of employees in "security positions" or "security agencies" so designated by the State Civil Service Commission. The statute was occasioned by the Korean conflict and was described as a measure to aid the country's defense and foreign affairs. New York Laws 1951, c. 232, §1; 1951 McKinney's Session Laws 1587. It was modeled after the federal statute passed the preceding year which was involved in *Cole* v. *Young*, 351 U.S. 536. It defined security positions and agencies as those involving the performance of functions "necessary to the security or defense of the nation or the state" or "where confidential information" relating to security might be available (§2).

The State law authorized the suspension of an employee when the employing agency "shall find, after proper investigation and inquiry, that upon all the evidence, reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state" (§5). The employee was to be notified of the reason "without disclosing confidential sources of information." He had the "opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty." Thereupon his employer might terminate his employment upon making the above finding of "doubtful trust or reliability."

The statute sets forth the kind of evidence of doubtful trust or reliability that may be adduced against an employee:

"In proceedings taken pursuant to this act, evidence shall not be restricted by the rules of evidence and procedure prevailing in the courts. A finding, pursuant to sections four or five of this act, may be based upon evidence of the previous conduct of the applicant, eligible, officer, or employee, as the case may be, which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive" (§7).

The "subversive" character of organizations was to be determined by the Commission itself or it could utilize designations by the federal authorities or the State Board of Regents (§8).

On November 23, 1953 the Commission (without notice, hearing or evidence) designated the New York City Transit Authority a security agency (R. 6, 13).[1] On March 24, 1954 the Commission designated the Communist Party a subversive organization under the Security Risk Law, adopting, without notice, hearing or evidence, the finding to that effect made by the New York State Board of Regents under the Feinberg Law, N.Y. Laws 1949, c. 360 (Education Law, Section 3022).

[1] See Fuld, J. dissenting below (R. 66, ftn. 2). The Commission had advised us by letter, which we have filed with this Court, that no hearing was held or evidence taken.

In September and October 1954, appellant, upon direction from his superiors, appeared before a Deputy Commissioner of Investigation of the City of New York. No charges had been served upon him; he was merely told that an investigation was being conducted under the Security Risk Law and that he would be dismissed under §903 of the New York City Charter if he refused to answer questions (R. 6).[2] He was then asked whether he was or ever had been a member of the Communist Party and he declined to answer, relying upon his constitutional privilege against self-incrimination (R. 6, 10-11).

Appellant was thereupon suspended by the Transit Authority on the ground that:

> "when testifying under oath at the office of the Commissioner of Investigation of the City of New York, you refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States" (R. 10).

The letter of suspension gave him thirty days to file an answering statement. Since the ground for suspension was limited to his invocation of the constitutional privilege, an act which was not denied, appellant made no further reply (R. 7).

On November 24, 1954, appellant was discharged by the appellees on two grounds: first, that he had asserted his constitutional privilege and, second, that "further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk" (R. 14).

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[2] This representation with regard to dismissal was inaccurate since appellant was not employed by the City of New York. The Charter provision is that involved in *Slochower* v. *Board of Higher Education*, 350 U.S. 551.

Appellant instituted this lawsuit in the state Supreme Court to declare invalid his suspension and discharge. His petition asserted, *inter alia*, that the Security Risk Law, as written and applied, and his suspension and discharge, were in violation of his federal constitutional right to due process (R. 8-9).

The lowest state court upheld the validity of the statute and of appellant's suspension and discharge thereunder (R. 17-27). The Appellate Division, one judge dissenting, affirmed the order below (R. 31-49). The Court of Appeals, two judges dissenting, affirmed the order of the Appellate Division (R. 50-70).

The Court of Appeals expressly held that appellant's dismissal for assertion of his constitutional privilege against self-incrimination did not deny him procedural and substantive due process under the Fourteenth Amendment to the Constitution, did not violate his right to freedom of speech, assembly and association under the said Amendment, and did not violate his privilege against self-incrimination under the Fifth Amendment and his immunities and privileges under the Fourteenth Amendment (R. 56-64).

Summary of Argument

1. This Court has jurisdiction because the appeal draws into question the invalidity of the Security Risk Law of the State of New York by reason of its repugnancy to the Constitution of the United States; the decision below is in favor of its validity [28 U.S.C. 1257 (2)].

2. Appellant's dismissal as a subway conductor with tenure, upon the ground that he is a security risk, contravenes the due process clause of the Fourteenth Amendment where the sole evidence thereof consists of the invocation

of his constitutional privilege against self-incrimination. A refusal to answer questions concerning political associations, made in good faith upon constitutional grounds, cannot be evidence that appellant is a security risk. Where the refusal is based upon the constitutional privilege against incrimination, to draw an inference of guilt would be so unreasonable in view of the history and significance of that privilege as to deny due process.

3. To the extent that the dismissal was based upon appellant's "further activities" he was denied due process under the Fourteenth Amendment, for such activities were never specified in the charges, were never sought to be proven, and are not even recited in the Transit Authority's decision suspending and discharging appellant. In addition, the statute, upon its face, denies procedural due process in its provisions for summary discharge without hearing, disclosure of evidence and opportunity for cross examination of adverse witnesses.

4. The statute, whose purpose is to deny public employment to those holding membership in so-called subversive organizations, violates appellant's freedom of speech, belief and assembly and his right to due process under the Fourteenth Amendment. The power of the State to suspend its constitutional guarantees depends upon actual necessity. There was no national emergency in 1954, a year after the end of the Korean conflict, which rationally could justify a state agency's summary discharge of a subway conductor for assertion of his constitutional privilege. A subway conductor who "opens and closes doors" does not occupy a position relating to national security.

5. The state law was passed in aid of the federal government's national security program. The City Commissioner of Investigation, in examining appellant, was in

fact acting as an agent of the federal government. In these circumstances appellant's right to assert his constitutional privilege against self-incrimination is based upon the self-incrimination clause of the Fifth Amendment and is an immunity and privilege under the Fourteenth Amendment.

6. The New York State Constitution contains a clause protective of the privilege against self-incrimination. That clause has been given a broad and liberal construction for many years by the Court below—except in cases such as this, involving political dissent. This discrimination against the very group for whose protection the privilege was originally created denies appellant both due process and the equal protection of the laws under the Fourteenth Amendment.

POINT I

This Court Has Jurisdiction of the Appeal.

This case involves the validity of the state law under the Fourteenth Amendment, which, as construed below, authorizes the discharge as a security risk of an employee with tenure, where the only evidence in support thereof is his invocation of the constitutional privilege against self-incrimination when asked whether he was or had been a member of the Communist Party. This issue was squarely raised and passed upon in the three State Courts (R. 8, 9; 17-20; 31-45; 50-64). One judge in the Appellate Division and two judges in the Court of Appeals agreed with appellant that he had been denied due process (R. 69-73; 86-91).

Appellant's challenge to the validity of the statute on due process grounds is the basis for this Court's jurisdiction under 28 U.S.C. §1257 (2). *Hamilton* v. *Regents of the University of California*, 293 U.S. 245; *McCollum* v. *Board of Education*, 333 U.S. 203; *Wieman* v. *Updegraff*, 344 U.S.

183; *Garner* v. *Los Angeles Board*, 341 U.S. 716; *Slochower* v. *Board of Higher Education*, 350 U.S. 551, rehearing denied, 351 U.S. 944; *Uphaus* v. *Wyman*, 355 U.S. 16.

That the federal issue is a substantial one is indicated by this Court's decision in the *Slochower* case, *supra*, upon which the three dissenting judges in the courts below relied, its decision in *Konigsberg* v. *The State Bar of California*, 353 U.S. 252, and its recent grant of certiorari in *Board of Public Education, School District of Phila.* v. *Beilan*, 353 U.S. 964. This appeal involves not only the issues of freedom of association and absence of a hearing presented by *Beilan*, and the power of government to inquire into matters of political association, *Konigsberg* v. *State Bar of California*, 353 U.S. 252, *Watkins* v. *United States*, 354 U.S. 178, *Sweezy* v. *New Hampshire*, 354 U.S. 234, *Uphaus* v. *Wyman, supra*; but the validity of the statutory imposition of sanctions for assertion of the constitutional privilege against self-incrimination.

The issue is an appropriate one for consideration under 28 U.S.C. 1257 (2) because the state courts have construed the state law to authorize the investigation, suspension and discharge of appellant and have upheld the statute against appellant's constitutional attack.

In the event that this Court should determine that an appeal will not lie under 28 U.S.C. 1257 (2), the case should be treated as an appropriate one for certiorari. *Sweezy* v. *New Hampshire, supra.*

POINT II

Appellant's Discharge, Where the Sole Alleged Evidence of His Unreliability Was the Assertion of His Constitutional Privilege, Denied Him Due Process of Law Under the Fourteenth Amendment.

The statute authorizes the discharge of a public servant with tenure upon evidence that "reasonable grounds exist for belief that because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state." The kind of evidence which the statute contemplates is set forth in §7 (Appendix, pp. 35-36).

The only "evidence" in this case was appellant's refusal to answer questions as to membership in the Communist Party, based upon his constitutional privilege against self-incrimination (R. 7, 14, 59).

The Transit Authority and the three courts below decided that appellant was a bad security risk because of his refusal, based upon the privilege, to state under oath whether he was or had been a member of the Communist Party (R. 10, 14).

The Transit Authority put the matter most plainly. The resolution suspending appellant stated that he had "refused to answer questions as to whether or not he was a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States" (R. 10).

The state Supreme Court held that the refusal of a public employee to testify "on grounds of self-incrimination" contravened the state's public policy, citing §903 of the City Charter and Article I, Section 6 of the New York State Con-

stitution (R. 24):[3] The Appellate Division said that it was "required to and should accept as truthful appellant's claim that truthful answers to the questions propounded might have tended to incriminate him" (R. 35). The Court of Appeals treated the case upon the hypothetical assumption that appellant had appeared twice—once to refuse to answer without reason, and a second time to assert the privilege (R. 60).

However varied the formulation, appellant was dismissed for asserting a constitutionally protected right of silence—which the courts below treated as evidence of "doubtful trust and reliability endangering the security or defense of the nation and the state" (R. 59).

In *Konigsberg* v. *State Bar of California*, 353 U.S. 252, this Court held that such a conclusion violated the due process clause. It decided that a good faith refusal to answer, upon constitutional grounds, as to Communist Party membership did not permit an adverse inference of doubtful character and loyalty (*id.* at p. 270). It also held that due process required the state to present evidence before it could deny admission to its Bar (*id.* at p. 262).

Appellant's constitutional position is even stronger than Konigsberg's: (1) admission to the Bar certainly calls for higher standards than work as a subway conductor; (2) traditionally, the states have exercised wide power over admission to the Bar; appellant on the other hand was a civil service employee with tenure resisting dismissal; see *In re Carter*, 192 F.2d 15; *cert. den.* 342 U.S. 862; (3) the statute here permits discharge only upon the basis of "evidence" against the employee; an applicant for admission to the Bar has the burden of proving his good char-

[3] That the State Supreme Court was in error in stating the public policy of the state (see cases *infra* p. 28) merely emphasizes the fact that the asserting of the privilege was regarded as evidence of unreliability.

acter; (4) there was some evidence against Konigsberg; there is none against appellant.

The adverse inference drawn below from appellant's assertion of the privilege is, of course, completely inconsistent with the decisions of this Court. *Slochower* v. *Board of Higher Education*, 350 U.S. 551, 557; *Ullmann* v. *United States*, 350 U.S. 422, 426-466; *Grunewald* v. *United States*, 353 U.S. 391; *Quinn* v. *United States*, 349 U.S. 155 and *Johnson* v. *United States*, 318 U.S. 189, 196-7. Indeed, it is sharply in conflict with the prior decisions of the court below (*infra* p. 28). See also *Travis* v. *United States*, 247 F.2d 130 (C.A. 10); *United States ex rel. Belfrage* v. *Shaughnessy*, 212 F.2d 128 (C.A. 2); and *Spector* v. *United States*, 193 F.2d 1002 (C.A. 9).

The Transit Authority and the three courts below imputed "a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." *Slochower* at p. 640. They overlooked this Court's authoritative reminder: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances" (*id.* at 641). There is no "rational connection between the fact proved and the ultimate fact presumed" (*Tot* v. *United States*, 319 U.S. 465, 467), *i.e.* between the assertion of privilege and the inference of unreliability.

In *Konigsberg*, this Court, in warning against such "unfavorable inferences," cited the cases involving the privilege against self-incrimination. And Mr. Justice Harlan's dissenting opinion pointedly notes: "There is no question here of drawing an unfavorable inference from a claim of the Fifth Amendment privilege. Petitioner repeatedly disclaimed any assertion of that privilege" (353 U.S. at 282, footnote 9).

Judges Fuld and Voorhis, dissenting below, were therefore quite correct in concluding that "invoking the Fifth Amendment does not have probative force to establish that

petitioner has engaged in subversive conduct or to establish that in his position of employment he 'would endanger the security or defense of the nation and the state' and that using it as evidence thereof constitutes a denial of due process of law" (R. 70). See also the dissenting opinion of Justice Beldock of the Appellate Division (R. 48-49).

The state courts' reliance upon *Garner* v. *Los Angeles Board*, 341 U.S. 716 is misplaced, since the New York Security Risk Law does not impose a duty to disclose. In any case, we question whether *Garner* is not overruled by *Konigsberg* or at least is not narrowed to a situation—unlike the present—where the statute gives fair warning that dismissal will follow non-disclosure. It will be recalled that in *Garner*, unlike this case and *Beilan*, the requirement of an affidavit was imposed by explicit statutory language. Finally, *Garner* did not consider the effect of a refusal to disclose based upon the constitutional privilege.

The state courts' attempt to distinguish *Slochower* on the ground that the constitutional privilege was there asserted with respect to a different chronological period is unsupported either by theory or authority. Cf. *Emspak* v. *United States*, 349 U.S. 190; *Brunner* v. *United States*, 343 U.S. 918.

The courts below also relied upon the fact that Dr. Slochower's assertion of privilege was before a congressional committee and appellant's before a local official (R. 61, 62). Again, as the dissenting judges noted, that was not the *raison d'être* of the decision (R. 48-49, 68-70). Further, the Commissioner of Investigation was not appellant's employer. The Transit Authority is a corporate entity separate from and independent of the City of New York. The Commissioner is a city official engaged in investigatory functions not dissimilar from those of the Congressional committee in the *Slochower* case. The proceeding before

his deputy was a formal one with the witness under oath and subject both to judicial enforcement and contempt proceedings for refusal to answer and to the dangers inherent in the waiver doctrine. (See *Rogers* v. *United States*, 346 U.S. 374.) Such an inquisitorial procedure cannot be equated with an employer's inquiry of its own employees concerning matters deemed relevant to their work, as in *Garner*.

Here, as in *Beilan*, the state is confronted by the lack of a disclosure statute which—absent assertion of the constitutional privilege—might have justified a dismissal under *Garner*. It therefore seeks in each case to give a completely artificial concept to the refusal to answer. In *Beilan*, the state argued that the refusal there to surrender constitutional rights is proof of "incompetency"; in this case it is called "evidence" of "unreliability."

There is a significant parallel between the *Beilan* case and the instant one. In each, the federal government, acting through a congressional committee of doubtful authority, *Watkins* v. *United States*, 354 U.S. 178, placed pressure upon a local government agency to harass local employees although their work bore no relationship to national security. In each, available statutes requiring proof of disloyalty were circumvented. In each, employees with long tenure and excellent employment records were dismissed because each insisted upon "the inviolability of privacy belonging to a citizen's political loyalties" *Sweezy* v. *New Hampshire*, 354 U.S. at 265.

We suggest that this state-employer pattern of disregarding conventional methods of proof, of by-passing the statutes intended to be used, of treating an assertion of constitutional right as evidence of wrongdoing or misfeasance —is so improper in terms of procedure, objective and effect as to be the very antithesis of due process.

POINT III

The Statute as Written and Applied Violates Procedural Due Process.

A. The Discharge for Undisclosed "Activities"

Appellant was compelled to appear before the Commissioner of Investigation without any knowledge of the charges, if any, against him (R. 6-7, 9). As appears above, he asserted his constitutional privilege and no evidence was introduced against him (R. 7). He was thereafter suspended upon charges limited to his assertion of privilege (R. 7, 10). Finally he was discharged, because he had asserted his privilege and because "further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk" (R. 14).

This action contravened appellant's right to due process, under which he was entitled to (1) reasonable notice of the charges, *In re Oliver*, 333 U.S. 257, 273; *Morgan* v. *United States*, 304 U.S. 1; (2) "a fair and open hearing" on such charges, *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 73; *Morgan* v. *United States, supra; Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117 and (3) a decision indicating the nature of the alleged activities.

Appellant has never received notice or charges of such "activities", has not been informed of the evidence of such activities and has not even been told what was intended by that general expression. The discharge for undisclosed reasons not the subject of prior charges or hearing raises "questions of elemental fairness" as serious as those involved in *Konigsberg* v. *State Bar of California*, 353 U.S.

252; *Cole v. Arkansas*, 333 U.S. 196, 201, and *Parker* v. *Lester*, 235 F.2d 787 (C.A. 9).

The New York state court has previously held in other cases that employees could not be discharged except upon "the charge litigated"; see *Matter of Meyer* v. *Goldwater*, 286 N.Y. 461, 463. The instant decision authorizing summary discharge upon grounds not set forth is a radical departure from these standards. It thus denies appellant equal protection of the laws, as well as due process. If the statute authorizes this treatment of employees with tenure, it, as well as the administrative actions and judicial decisions herein, violates the due process provisions of the federal constitution.

B. The Statutory Deficiencies

Until 1951 a New York civil service employee with tenure could not be discharged for membership in an organization advocating the overthrow of the government, in the absence of a judicial hearing in which evidence was presented against him. Section 12-a of the New York Civil Service Law provided in part:

> "The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility."

It was upon this basis that this Court held that the Feinberg Law which implemented §12-a did not deprive New York teachers of procedural due process. *Adler* v. *Board of Education*, 342 U.S. 485.

Subsequently, in matter of *Hughes* v. *Board of Higher Education of the City of New York*, 309 N.Y. 319, the Court

of Appeals interpreted and enforced §12-a by holding that the employee had a right to a *de novo* trial in open court regardless of the administrative hearings which had led to his dismissal. That court pointed out that in the *Adler* case "our construction of the *de novo* trial provisions of §12-a as applied to Feinberg Law removals was accepted by the Supreme Court as being part of the protections provided by this state for teachers accused of Communism."

These protections are not given to employees summarily discharged under the Security Risk Law. That statute permits a dismissal upon the basis of charges alone, unsupported by any evidence whatsoever. The employer's action is taken in "its absolute discretion and when deemed necessary in the interests of national security" (§1105). While the statute makes reference to "evidence", it is clear from the statutory language and its application herein that the public agency is merely required to notify the employee "of the reasons for such action", and not of the evidence in support thereof. And even these reasons are not to be fully divulged if they would disclose "confidential sources of information of law enforcement agencies or agencies empowered or required by law to investigate subversive activities or disloyalty" (§1105).

It is most difficult to perceive how national security can be adversely affected by a *state's* revelation of the *reasons* for a summary discharge of one of its employees. In any event, those protections, namely, a hearing with the taking of testimony, the opportunity for cross-examination, and the burden of sustaining the charges upon the employer—which led this Court and the New York Court of Appeals to their conclusions in the *Adler* case, are all lacking in the present one. On its face the Security Risk Law denies appellant and all other employees the procedural due process guaranteed by the Fourteenth Amendment.

POINT IV

The Statute's Proscription of Membership in So-Called "Subversive" Organizations Violates Freedom of Speech, Belief, Assembly and Association Under the Fourteenth Amendment.

A. Freedom of Association

The foundation stone of the statute is "membership in any organization or group found by the State Civil Service Commission to be subversive" (§7). This is the section pursuant to which employees are investigated; it is the section under which they are discharged.

The subject matter of the other subdivisions, which involve reprehensible, usually criminal, conduct has not aroused interest in those responsible for enforcing the Security Risk Law. The authorities have been concerned exclusively with acts of association which this Court has held to be protected by the First Amendment. In this respect they have followed directly in the paths of many legislative committees, public employers and state agencies this past decade. *Konigsberg* v. *State Bar of California, supra* and cases therein cited; *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, and ftn. 13; *Wieman* v. *Updegraff*, 344 U.S. 183.

The right to join a political party and to participate in its meetings is guaranteed by the First Amendment and the due process clause of the Fourteenth. *DeJonge* v. *Oregon*, 299 U.S. 353. Government employees are not stripped of constitutional rights by virtue of their employment. *Wieman* v. *Updegraff, supra*, at 191-2.

The power of the state to suspend these constitutional guarantees depends upon actual necessity. *American Com-*

munications Association v. *Douds*, 339 U.S. 382; *Herndon* v. *Lowry*, 301 U.S. 242, 258.

This Court is not bound by executive declarations of emergency where an actual emergency is a constitutional prerequisite to a limitation upon the constitutional rights of citizens. *Block* v. *Hirsh*, 256 U.S. 135; *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, 547, 548; *Perrin* v. *United States*, 232 U.S. 478; *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 442. It can review the situation and determine whether an emergency continues to exist and whether there is an actual need to exercise the emergency powers affecting personal liberties.

Despite the preamble to the Security Risk Act, the Korean conflict did not give rise to an emergency requiring a security program for state and city employees. Certainly there was no national emergency at the time of appellant's discharge in 1954, a year after the end of the Korean conflict, which rationally could justify the summary discharge of a subway conductor for political associations, much less for asserting his constitutional privilege on the subject. Appropriately, the assertion of emergency appearing in the original Security Risk Law was never repeated in the routine reenactments of that statute.

Hence, Governor Harriman's Committee on Public Employee Security Procedures filed an interim report on January 28, 1957 criticizing the State Civil Service Commission for its designation of governmental departments as security agencies whose "immediate connection with the security and defense of the nation and the state is not readily discernible" (Interim Report of Committee on Public Employee Security Procedures, Appendix B herein, pp. 42-46). A distinguished Bar Association committee made a similar criticism with respect to the national program equally applicable here. (Report of the Special Com-

mittee on the Federal Loyalty-Security Program of the Association of the Bar of the City of New York (1956) p. 141.)

Finally, the most authoritative recognition of the realities and of the constitutional problems involved appears in this Court's decision in *Cole* v. *Young*, 351 U.S. 536. In that case this Court examined the federal statute, the Act of August 26, 1950, 64 Stat. 476 (5 USCA §22-1), upon which the New York Security Risk Law was based. The federal statute provided for the summary dismissal of employees whose work affected national security. It had been construed by the President as permitting the designation of virtually every branch of the Government as a security agency, precisely the procedure followed by the State Civil Service Commission herein.

This Court held that so broad a construction of the statute was improper and unreasonable and that the term "national security" must be given a fair and realistic meaning. *Cole* v. *Young*, 351 U.S. 536. While this Court may not have the same power to construe state law, it can determine, particularly in view of the federal origins of the statute here involved, that the construction below is so arbitrary and unreasonable as to deny due process. Alternatively, it may conclude that a statute, thus broadly construed, is an unwarranted interference with freedom of association.

The foregoing discussion shows that the statute and the Commission's general implementation of it unreasonably interferes with First Amendment freedoms in violation of substantive due process. This becomes even plainer in the attempted application of the statute to appellant.

B. Appellant's Innocuous Work

It is ludicrous to say that a subway conductor is engaged in work necessary to national security and defense. His

primary duties "consist of opening and closing subway car doors to permit the entrance and exit of passengers together with certain routine duties incidental thereto" (R. 6). His place of work is one of the subway cars which carry millions of passengers daily. It is irrational to discharge him for political reasons—particularly for the assertion of a constitutional right—since his fellow passengers continue to travel in the same subway cars without security clearance, upon the mere payment of their fares.[4] Appellant himself is not barred from riding on the very subway cars in which he has been denied the right to act as conductor.

The State Civil Service Commission sought to avoid a determination that appellant's position was related to national security or defense by declaring the entire Authority a security agency, thereby making washroom attendants, clerks and subway conductors subject to this statute. Obviously, such a determination was not, indeed could not be, based upon evidence. The record, as Judge Fuld notes below, "tells us nothing of the steps taken by the Commission in reaching its determination."[5] However, the Com-

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[4] As the Bar Association Committee notes: "If the nation embarks upon personnel security clearance of employees to prevent sabotage in one segment of industry, the logic of the policy would call for its extension widely through industry and business. Indeed, even this would not suffice, because this way any employees of important industry establishments can still sabotage them." This logic would thus lead to peacetime personnel security clearance for almost all citizens. The danger to liberty from such a course should cause us to set ourselves resolutely against it (p. 144).

[5] He added: "Moreover, we are left completely in the dark as to whether the appellant or others affected were notified that the matter was under consideration, or even that the determination had been made. (Security Risk Law, §§2, 3; cf. *Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 165 *et seq.*, per Frankfurter, J., concurring). We are not even told where the determination of the commission is to be found or whether any opportunity was afforded for the prescribed judicial review (§§3, 4; cf. *Adler* v. *Board of Educ.*, 342 U.S. 485, 490)" (R. 66).

mission has elsewhere advised us that its determination was not based upon the taking of evidence but upon discussions with some of the agencies involved.[6]

The designation of the Transit Authority as a security agency, two years after the promulgation of the statute and subsequent to the end of the Korean conflict, was unrelated to genuine security considerations. The designation was made closely following hearings conducted by the House Committee on Un-American Activities that year. (See *Interim Report of the Committee on Public Employee Security Procedures*, Appendix B, p. 44.) These federal pressures upon the Commission are hardly a substitute for the evidence required by the due process clause.

C. The Statutory Disregard of Other Aspects of Substantive Due Process.

The statute on its face, and as applied, is subject to two other objections under the Fourteenth Amendment.

It makes "membership in any organization or group found by the State Civil Service Commission to be subversive" a ground for discharge. The statute does not require *scienter* before the dismissal of an employee. In this respect it does not meet the test of validity imposed by this Court in *Wieman* v. *Updegraff*, 344 U.S. 183.

Secondly, the Security Risk Law does not limit dismissals to persons who remain members of an organization after its proscription. This is in sharp contrast with the New York *Feinberg Law* which, pursuant to the implementing regulations of the Regents, gave employees this opportunity to resign after they were aware of the administrative characterization of their organization. (*Adler* v. *Board of Edu-*

[6] Letter dated Nov. 1, 1956, on file with the Clerk of the Court.

cation, 342 U.S. 485, 491.) A statute such as the Security Risk Law, which penalizes employees for their past political activities, has so much of the *ex post facto* and attainder about it that it impairs due process rights under the Fourteenth Amendment.

POINT V

The Statute Impaired Appellant's Constitutional Privilege Against Self-Incrimination Under the Fifth Amendment and His Privileges and Immunities Under the Fourteenth Amendment.

The Security Risk Law was passed in aid of the federal government's national security program. It is described as an Act relating to public employment "deemed dangerous to the national welfare, safety and security" (L. 1951, c. 233, Preamble). The state legislature declared that the Korean conflict had created a national emergency and referred to the President's declaration of such emergency "calling for the intensive and concentrated mobilization and utilization of the resources and facilities of the nation and for the coordination and direction of state and local activities relating to civilian protection and to state and national defense" (§1). It found "that the employment of members of subversive groups and organizations by Government presents a grave peril to the national security" (*id.*).

Governor Dewey described the bill as "a temporary measure designed to insure the greatest possible cooperation of state agencies with federal agencies in providing for the defense of this country and supporting its policies in foreign affairs." (Governor's Memorandum, New York Unconsolidated Laws, §§1101 *et seq.* pocket part, p. 31.)

The statute authorizes the Civil Service Commission (a) to accept under certain circumstances the United States

Attorney General's findings as to the subversive character of organizations (§8), and (b) to enter into contracts with the federal authorities "for the supplying of * * * assistance necessary for the performance of its duties pursuant to this act" (§8).

We have also seen that the designation of the Transit Authority as a security agency directly followed the arrival in New York of the House Committee on Un-American Activities (*supra*, p. 24).

The Deputy Commissioner of Investigation acted as an agent of the federal government when he examined appellant under this law relating to "security or defense of the nation" (§1). Further relevant information given the state in this loyalty-security area would undoubtedly be transmitted to the Federal Bureau of Investigation (see, *e.g.*, *Commonwealth of Pennsylvania* v. *Nelson*, 350 U.S. 498, 506, 519, ftn. 10).[7] Since appellant could have asserted his constitutional privilege in a federal proceeding, without state sanctions, *Slochower* v. *Board of Higher Education*, 350 U.S. 551, he had the same right in the hearing conducted by the City Commissioner, purportedly acting in the national interest. For appellant's rights against the agent could not be less than those against the principal.

The situation here is analogous to that in *Gambino* v. *U. S.*, 275 U.S. 310, 319, where the "peculiar relation borne in New York * * * by state officers to federal prohibition enforcement" led to reversal of a federal conviction based upon evidence unlawfully seized by state officials. The relationship between state and federal authorities in the area of subversive activities generally and under this statute in

[7] In *Braden* v. *Commonwealth of Kentucky*, 291 S.W.2d 843 (Ky.), a prosecution under a state sedition law, the prosecution's witnesses were supplied by the House Committee on Un-American Activities and by the Federal Bureau of Investigation.

particular is even closer. If the state is not precluded under *Commonwealth of Pennsylvania* v. *Nelson, supra,* from protecting the national interest by a state sedition law relating to its employees—an issue not there resolved—it is at least subject in that situation to the constitutional limitations imposed upon national power.

Appellant's right to assert his constitutional privilege with respect to federal crime in what amounts to a federal proceeding (however denominated) is a privilege of *national* citizenship. His dismissal abridged his privileges and immunities, since they "arise out of the nature and essential character of the national government" (*Twining* v. *New Jersey*, 211 U.S. 78, 97).[8] The issue was raised by appellant below (R. 13, 14; *cf. Slochower* v. *Board of Higher Education, supra*, at 639, 646). If necessary to the decision in this case, this issue should therefore be resolved in favor of appellant.

POINT VI

The Denial to Appellant of His State Constitutional Privilege Against Self-Incrimination Denied Him Due Process and the Equal Protection of the Laws Under the Fourteenth Amendment.

Article I, §6 of the State Constitution provides that one shall not "be compelled in any criminal case to be a witness against himself."[9] This section has been given a broad and

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[8] In view of the federal purpose of the statute and the role of the Commissioner of Investigation, as federal agent, it is not necessary for appellant to seek reconsideration by this Court of the decision in *Adamson* v. *California*, 332 U.S. 46.

[9] The constitutional exception of a state employee refusing to "testify concerning the conduct of his office or the performance of his official duties before a grand jury" is obviously inapplicable here.

liberal construction for many years in the court below in favor of the citizen. *In re Grae*, 282 N.Y. 428; *People ex rel. Taylor* v. *Forbes*, 143 N.Y. 219, 227; *Matter of Doyle*, 257 N.Y. 244; *People* v. *Harris*, 294 N.Y. 424; *People* v. *Doyle*, 1 N.Y. 2d 732; *Matter of Kaffenburgh*, 188 N.Y. 49.[10]

This construction may be illustrated by a few examples: In *People* v. *Harris, supra*, the Court of Appeals extended the constitutional language protecting the privilege by holding that the Albany Water Commissioner did not forfeit public employment after his refusal to testify, but could be given a new office of "Superintendent of Water Rent Delinquencies."

In *People* v. *Doyle*, 1 N.Y. 2d 732, affirming 286 App. Div. 276, the Court of Appeals again chose an interpretation most protective of the privilege. It held that the Surrogate of Saratoga County could retain his position while refusing to testify as to his prior stewardship as District Attorney. In the *Grae* and *Kaffenburgh* cases, *supra*, it held that

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[10] Thus:

"The privilege against self-incrimination is a constitutional guaranty of a fundamental personal right." (*Matter of Grae* at 434.)

"It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State; and neither legislators nor judges are free to overleap it." (*Matter of Doyle* at 250.)

"The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court." (Lazansky, *P.J.*, dissenting in *Matter of Ellis*, 258 App. Div. 558, 572, reversed, 282 N.Y. 435; dissenting opinion approved in *Matter of Grae*, 282 N.Y. 428.)

"When a proper case arises, they (constitutional and statutory provisions against self-incrimination) should be applied in a broad and liberal spirit, in order to secure to the citizen the immunity from every species of self-accusation implied in the brief but comprehensive language in which they are expressed." (*Matter of Kaffenburgh*, 188 N.Y. 49, 53.) (Language in parentheses supplied.)

members of the Bar, despite their positions as officers of the Court, were entitled to assertion of the privilege without penalty.

Examples could be multiplied to show the insistence by the Court of Appeals upon a liberal construction of the privilege in favor of the witness, repeated warnings by it against any inference of guilt and refusals by it to permit the imposition of governmental sanctions.

The only persons in the State of New York punished under the decisions of the court below for invocation of the privilege are those involved in so-called security cases. This was first done in the state court's decision in *Daniman* v. *Board of Education*, 306 N.Y. 532, reversed in part, *sub nom.*, *Slochower* v. *Board of Higher Education*, 350 U.S. 551. This policy is carried further by the present decision, which equates assertion of the privilege with evidence of guilt.

Discrimination against a particular class, by judicial interpretation of state statute or constitution, denies equal protection of the laws under the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U.S. 1, 14. The discrimination and classification is particularly unreasonable where it is directed against persons accused of political dissidence, the very group intended to be protected by the Fifth Amendment. *Quinn* v. *United States*, *supra*, p. 163, ftn. 31. New York stands alone in its imputation of guilt. Florida has only recently decided otherwise. *Sheiner* v. *Florida*, 82 So. 2d 657, cited in *Konigsberg* v. *State Bar of California*, *supra*, p. 270, ftn. 31. The special treatment accorded appellant is so unreasonable, particularly in view of the history and purposes of the constitutional privilege, that it constitutes a denial both of due process and of equal protection of the laws under the federal constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

The Security Risk Law

The Security Risk Law of New York, Chapter 233, Laws of 1951, as amended by Chapter 105, Laws of 1954, effective March 15, 1954, read as follows at the time of appellant's suspension and discharge:

> "An Act to amend chapter two hundred thirty-three of the laws of nineteen hundred fifty-one, entitled 'An act declaring the existence of a public emergency and authorizing the disqualification of applicants and eligibles for entrance into public service, and the suspension and removal or transfer of officers and employees in the service of the state and its civil divisions, whose appointment or continued employment during the emergency is deemed dangerous to the national welfare, safety and security,' in relation to the adoption by the state civil service commission of designations of subversive organizations made by the United States attorney general or the state board of regents, and by extending its provisions to June thirtieth, nineteen hundred fifty-five."

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Declaration of legislative findings and intent. The legislature hereby finds and declares the existence of a serious public emergency in this state resulting from the following acts and events among others: the mandate of the United Nations to its armed forces, including those of the United States, to repel armed aggression against the government and the people of Korea south of the 38th Parallel; the proclamation by the president of the United States of America declaring the existence of a national emergency and calling for the intensive and concentrated mobilization and utilization of the resources and facilities of the nation and for the coordination and direction of state and local activities related to civilian protection and to state and national defense. The legislature also finds that

the employment of members of subversive groups and organizations by government presents a grave peril to the national security. These groups and organizations are frequently well organized and rigidly disciplined, and often, under the direction and control of a foreign power, are dedicated to the task of bringing about the overthrow of existing legally constituted government by any available means, including force if necessary. If members of such organizations and groups and persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the existence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States. In view of this imminent and great danger to our national security, it is vital and essential that measures be taken to effect the disqualification for entrance into and the suspension and removal from security offices and positions in governmental service of persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in security positions would endanger the security or defense of the nation and the state. In consequence thereof, the necessity for the enactment of this act and for the operation and effectiveness of its provisions during the period of such emergency, beginning from the date this act takes effect and terminating on the thirtieth day of June, nineteen hundred fifty-two, are hereby declared as a matter of legislative determination.

§2. Definitions. (a) The term "security agency" as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available.

(b) The term "security position" as used in this act shall mean (1) any office or position in the public service which

requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available.

§3. Determination of security agency and security position. Upon its own initiative or whenever requested by the head of any department, bureau, division or other agency of the state government, or by any municipal civil service commission, or board, or body, authorized by law to conduct examinations and certify eligibles for positions in the service of the state or its civil divisions, the state civil service commission shall determine whether or not (1) an agency is a security agency within the meaning of section two (a) of this act, or (2) a position is a security position within the meaning of section two (b) of this act. Such determination by the state civil service commission shall be subject to review by the courts in accordance with the provisions of article seventy-eight of the civil practice act.

§4. Disqualification of applicant or eligible. The state civil service commission or other board or body authorized by law to conduct an examination and certify an eligible for appointment to a security position in governmental service shall refuse to examine an applicant for, or after examination, to certify an eligible to, such position if it finds, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such applicant or eligible would endanger the security or defense of the nation and the state.

§5. Suspension and removal or transfer. Any public officer, board, body or commission of the state or of any civil division thereof authorized by law, rule or regulation to exercise the power of appointment may, in his or its absolute discretion and when deemed necessary in the interests of national security, transfer, subject to the approval of the civil service commission having jurisdiction, to a position other than a security position or to an agency other than a security agency, or suspend without pay any officer or employee under his or its appointive jurisdiction

occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state. The officer or employee with respect to whom such action was taken shall be notified that such action was taken pursuant to this section and, to the extent possible without disclosing confidential sources of information of law enforcement agencies, or agencies empowered or required by law to investigate subversive activities or disloyalty, the reasons for such action. Within thirty days after such notification, such person shall have an opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty. Following such further investigation and review as he or it shall deem necessary, the officer, board, body or commission taking such action shall affirm the transfer or terminate the employment of such officer or employee if he or it shall find, that, upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability, the employment of such person in a security position or in a security agency would endanger the security or defense of the nation and the state. If the officer, board, body or commission finds no reason to warrant the transfer or removal of such officer or employee, he shall be restored to his position and if such officer or employee has been suspended from his position, he shall, upon restoration, be entitled to back pay for the period of his suspension.

§6. Appeal to state civil service commission. Any person who believes himself aggrieved by a determination of disqualification under the authority of section four of this act and any officer or employee who believes himself aggrieved by a determination of transfer or dismissal under the authority of section five of this act may appeal from such determination by an application in writing to the state civil service commission within twenty days after receiving written notice of such determination. Such commission

shall set a time and place for the hearing of such appeal and give due notice thereof to the appellant and to the officer, board, body or commission whose determination is under review. The hearing shall be held by the commission or by a person or persons, not exceeding three, designated by the commission in writing to hear such appeal in its behalf. The Commission, in its discretion, may designate such person or persons to hear and determine said appeal or to hear and report to the commission and, in the latter event, the report shall be acted upon by the entire commission. The persons so designated by the commission may be officers or employees of the civil service of the state. They shall have the power to require amplification of the reasons for the action appealed from and to administer oaths, hold or conduct public or private hearings, subpoena and compel the attendance of witnesses, and the production of books, papers, records and documents. The person or persons holding such hearing shall make such inquiry as may be deemed advisable, and shall upon the request of the appellant permit him to be represented by an attorney and to present evidence in his behalf. The Commission or the person or persons authorized to hear and determine such appeal may affirm, reverse or modify the findings and determination under review and, in the case of reversal, shall order the reinstatement of the appellant, and if such appellant had been dismissed from his position, he shall, upon restoration, be entitled to back pay from the date of his suspension. The commission may direct the transfer of an appellant to a similar position in another division or department other than a security position or a position in a security agency, or may direct that his name be placed upon a preferred list pursuant to section thirty-one of the civil service law for reinstatement to a position other than a security position or a position in a security agency. The decision of the commission or the person or persons designated by it to hear and determine such appeal shall be final and conclusive and shall not be subject to review in any court.

§7. Evidence. In proceedings taken pursuant to this act, evidence shall not be restricted by the rules of evidence and procedure prevailing in the courts. A finding, pursuant to

sections four or five of this act, may be based upon evidence of the previous conduct of the applicant, eligible, officer, or employee, as the case may be, which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive.

§8. Subversive groups and organizations. As used in this act, a subversive group or organization shall be one which is found by the state civil service commission, after inquiry, and after such notice and hearing as may be appropriate, to advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or to advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. The commission, in making such inquiry, may utilize any listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, or by the state board of regents, and for the purposes of such inquiry the commission may request and receive from said federal agencies or authorities or state board of regents, any supporting material or evidence that may be made available to it. Where any organization or group has been so designated by the United States attorney general pursuant to executive order number ten thousand four hundred fifty, of April twenty-seventh, nineteen hundred fifty-three or any executive orders or regulations amendatory or supplemental thereto, or by the state board of regents pursuant to section three thousand twenty-two of the education law, or any acts amendatory or supplemental thereto, the state civil service commission may adopt such designation for the purposes of this act, provided such des-

ignation by the United States attorney general or the state board of regents was made after due notice to such organization or group and an opportunity afforded it to answer.

§9. To the extent of appropriations available therefor, the civil service commission is authorized to enter into contract with the federal bureau of investigation, the United States department of justice, or any other appropriate public agency for the supplying of information in making investigations, or any other assistance necessary for the performance of its duties pursuant to this act.

§10. The provisions of this act shall be controlling notwithstanding the provisions of any other general, special or local law.

§11. The provisions of this act shall remain in effect until June thirtieth, nineteen hundred fifty-five.

§12. This act shall take effect immediately.

Since its original passage in 1951, the statute has been extended six times for additional one year periods. L. 1952, c. 46; L. 1953, c. 26; L. 1954, c. 105; L. 1955, c. 156; L. 1956, c. 310; L. 1957, c. 176. No changes were made in its text except for an amendment to §6 in 1953 to permit representation by counsel. L. 1953, c. 26, and an amendment in 1954 adding the last sentence to §8. L. 1954, c. 105.

NEW YORK STATE CONSTITUTION:

Article I, Section 6:

> ". . . No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for

a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general.

NEW YORK CITY CHARTER

"§801. Department; commissioner.—There shall be a department of investigation the head of which shall be the commissioner of investigation who shall be appointed by the mayor. He shall be a member of the bar of the state of New York in good standing."

"§802. Deputies.—The commissioner may appoint two deputies, either of whom may, subject to the direction of the commissioner, conduct or preside at any investigations authorized by this chapter."

"§803. Powers and duties.—The commissioner:

1. Shall make any investigation directed by the mayor or the council.

2. Is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency."

* * *

"§903. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employ-

ment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

NEW YORK CIVIL SERVICE LAW

"§12-a. Ineligibility

No person shall be appointed to any office or position in the service of the state or of any civil division or city thereof, nor shall any person presently employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendents, principals or teachers in a public school or academy or in a state normal school or college, or any other state educational institution who: (a) By word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) Prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein;

(c) Organizes or helps to organize or becomes a member of any society or group of persons which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means;

(d) A person dismissed or declared ineligible may within four months of such dismissal or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a

hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section. The hearing shall consist of the taking of testimony in open court with opportunity for cross-examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility. Added L. 1939, c. 547; amended L. 1940, c. 564, eff. April 17, 1940."

NEW YORK CIVIL SERVICE LAW

§22 (2)

". . . No officer or employee holding a position in the competitive class of the civil service of the state, or any civil division or city thereof, shall be removed except for incompetency or misconduct."

PUBLIC AUTHORITIES LAW

"§1201. New York City Transit Authority

1. A board, to be known as 'New York City Transit Authority' is hereby created. Such board shall be a body corporate and politic constituting a public benefit corporation. It shall consist of three members. One member shall be appointed by the mayor, and one member shall be appointed by the governor. After the appointment and qualification of such two members, they shall, as promptly as possible, appoint a third member who shall be chairman of such board."

"§1210. Employees

1. Employees in the competitive and labor classes of the classified service in the employ of the board of transportation and performing services in respect to subjects or matters, jurisdiction of which was transferred to the authority, with the approval of the authority shall be transferred to comparable positions in

the employ of the authority; and, any officers and other employees of such board of transportation may be so transferred and appointed by the authority.

2. The appointment, promotion and continuance of employment of all employees of the authority shall be governed by the provisions of the civil service law and the rules of the municipal civil service commission of the city. Employees of any board, commission or department of the city may be transferred to positions of employment under the authority in accordance with the provisions of the civil service law and shall be eligible for such transfer and appointment without examination to such positions of employment. Employees who have been appointed to positions in the service of the city under the rules of the municipal civil service commission of the city shall have the same status with respect thereto after transfer to positions of employment under the authority as they had under their original appointments. Employees of the authority shall be subject to the provisions of the civil service law.

APPENDIX B

Interim Report of the Committee on Public Employee Security Procedures

The Committee on Public Employee Security Procedures, appointed by Governor Harriman on September 15, 1956 for the purpose of studying New York State laws relating to the loyalty and security of public employees, hereby submits an interim report.

The Committee has held numerous meetings to learn the view of interested persons and organizations. It has also made its own studies of the relevant laws and held one public hearing. Some thirty-one individuals or organizations have been heard. Government officials, federal, state and city, have been consulted.

Within the time available to it, the Committee has not been able to complete its investigations, and it is unable to make a final report at this time. However, the Committee can now express certain conclusions with respect to the manner in which existing laws have operated.

At the present time there are two basic laws in effect.

Section 12-a of the Civil Service Law, passed in 1939, provides, in substance, that no person shall be appointed to, or continue in, any public office or position, who "willfully and deliberately advocates" that the government "should be overthrown" by "force, violence or any unlawful means," or who prints, publishes or sells any printed matter advising such doctrine, and advocates the duty or propriety of adopting such doctrine, or who "organizes" or "becomes a member" of any group which "teaches or advocates" such doctrine. The accused may obtain from the Supreme Court a hearing in open court as to the validity of the dismissal or disqualification. He is accorded the opportunity for cross examination, and the burden is on the employing officer to sustain the order of dismissal or ineligibility "by a fair preponderance of the credible evidence."

In 1951 the other measure, temporary legislation known as the Security Risk Law (Section 1101-1108, Unconsolidated Laws), was passed. Since 1951 it has been reenacted

each year, and it now remains in effect until June 30, 1957. This law declares that an emergency exists by reason of the Korean conflict, and provides that public employees in "security agencies" and "security positions" may be removed or disqualified where "reasonable grounds exist for belief that, because of doubtful trust and reliability," their employment "would endanger the security or defense of the nation and the state." The Security Risk Law does not provide for hearing in court with opportunity for cross-examination as to the validity of a discharge. The law gives the accused a right of appeal to the State Civil Service Commission or someone designated by it who "shall make such inquiry as may be deemed advisable." A discharge may be based upon evidence which would not be admissible in court, and upon "confidential sources of information" which need not be disclosed to the accused. The responsibility for determining what is a "security agency" and what a "security position" is assigned by the law to the State Civil Service Commission in accordance with the following definitions:

> "(a) The term 'security agency' as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation may be available.
>
> "(b) The term 'security position' as used in this act shall mean (1) any office or position in the public service which requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available."

The Security Risk Law of 1951 was based upon the premise that there were truly sensitive positions in New York public employ where persons of doubtful trust and reliability could "endanger the security or defense of the nation

or the state." In such instances the Legislature deemed that summary procedure for removal, with relaxed standards of proof and without the personal safeguards of court trial, confrontation of witnesses, and the like, was justified. However, Section 12-a of the Civil Service Law, permits an employee discharged on loyalty grounds to have a court trial with opportunity for cross-examination and with the burden of proof on the discharging officer. Since persons in sensitive positions would be discharged under the Security Risk Law, the Legislature, by leaving in effect Section 12-a of the Civil Service Law, recognized that the badge of disloyalty should not be affixed to persons employed in non-sensitive positions in disregard of some of our ancient procedural safeguards.

When the Security Risk Law became effective in the spring of 1951, the State Civil Service Commission announced that it would not undertake to determine "security agencies" and "security positions" in the absence of a request by the department concerned. No such request was made for more than two years. In 1953, after a sub-committee of the House Un-American Activities Committee had held hearings in the state, a wave of activity by the State Civil Service Commission took place, and it commenced to specify "security agencies" and "security positions." The Commission, which did not have the benefit of any court decisions construing these broad terms, has to date designated some twenty agencies in the state and some forty units of the New York City government as "security agencies" or as having "security positions" within them. The immediate connection with the "security or defense of the nation and the state" of many of these agencies and positions is not readily discernible. For example, scientists in the Paleontology Section of the Department of Education have been specified as holding "security positions," on the ground that they have knowledge concerning the location of caves and their suitability for defense storage purposes. The Department of Sanitation of the City of New York has been designated as a "security agency" on the theory that disease might spread in the event that department did not perform its duty. Even probation service of the New York City Domestic Relations Court has been designated as a

"security position," though it would seem to have no relationship to the "security or defense of the nation and the state." One might expand at length the list of agencies or posts which have been denominated "security" though they have remote, if any, connection with matters which that term ordinarily connotes.

Under these broad designations 141,686 persons have been checked for employment in state agencies, and 13 have been disqualified or have resigned after investigation. The Committee is informed that in New York City some 100,000 employees have been investigated. Of those checked in New York City some 34 have resigned and some 17 have been dismissed. Approximately eighty-one percent of all employees of New York City are in agencies or positions which have been designated as "security." The Committee has been told that in the state government in the neighborhood of thirty percent of the employees are in "security" positions or agencies.

The Committee believes that the interpretation which has been given in the past by the State Civil Service Commission to the terms "security agency" and "security position" is inconsistent with the basic purpose of a "security" law. That purpose is to permit relatively summary and sometimes arbitrary removals from places which may fairly be denominated "sensitive" in relation to the safety or defense of our nation or our state.

Since the Committee is not yet in a position to propose comprehensive suggestions and needs further time for study, it suggests that the Security Risk Law be reenacted for one more year, but with appropriate amendments restricting its application to positions more closely related to security or defense, so that effort may be concentrated in areas of greatest sensitivity.

The Committee deems the proper measure of a "security" position within the meaning of the Security Risk Law to be whether the occupant has access to material classified as secret or top secret by the federal government or has opportunities substantially greater than those available to members of the public generally by disclosure of secret information or by sabotage to endanger the security of the nation or the state. While we have not yet discovered that

any such classified material reaches the eyes of New York employees, we are attempting to obtain definitive advice on this and other subjects from the responsible officials of the federal government. To subject to summary removal procedures and the label of disloyalty, without benefit of court trial, presumption of innocence, and confrontation of witnesses, employees who are not more advantageously situated to commit espionage or sabotage than is the ordinary citizen, is to run counter to our history of personal rights.

The Committee therefore recommends that the Security Risk Law be reenacted for one more year with amendments to eliminate the provision for the designation of "security agencies" and to make the law applicable only to "security positions," to be defined as follows:

> "any position in the public service the occupant of which would (a) have access to material classified by federal authorities as secret or top secret, or (b) have opportunities substantially greater than those available to the general public, by disclosure of secret information or by sabotage to endanger the security of the state or nation."

By thus restricting the Security Risk Law to positions which may be deemed sensitive, it will be possible to concentrate on more vital positions, and avoid dissipation of effort. The Committee believes that this will result in more effective protection of the security of the state and nation.

As already stated, this is merely an interim report, and should not be construed as any indication that the Committee has made any other determination as to present laws relating to loyalty and security. These matter are still under study and will require further investigation before the Committee can express its convictions.

Respectfully submitted,

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